



CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2502

RIN 3045-AA77

Employee Indemnification Regulations

AGENCY: Corporation for National and Community Service.

ACTION: Final rule.

SUMMARY: The Corporation for National and Community Service (operating as AmeriCorps), is finalizing regulations to indemnify AmeriCorps employees who, because of conduct taken within the scope of employment with AmeriCorps, have a verdict, judgment, monetary award, or personal damages claim issued against them that is not otherwise covered by the Federal Tort Claims Act. These regulations set out how AmeriCorps employees may request indemnification or settlement of a claim and the circumstances in which AmeriCorps may approve indemnification or settlement of a claim.

DATES: Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Kiara Rhodes, Associate General Counsel, Corporation for National and Community Service, 250 E Street SW, Washington, DC 20525, PublicComments@cns.gov, 202-606-6709.

SUPPLEMENTARY INFORMATION:

I. Background

This rule addresses indemnification of AmeriCorps employees in circumstances not covered by the Federal Employee Liability Reform and Tort Compensation Act of 1988 (FELRTCA), 28 U.S.C. 2679(b)(1), or the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b). FELRTCA provides that, with certain exceptions, the FTCA is the

exclusive remedy for injuries caused by a Federal employee acting in the scope of employment, such that the United States must be substituted as the defendant and the claim must proceed against the Government under the FTCA. *See* 28 U.S.C. 2679(b)(1). The exceptions, for which substitution is not available, are claims brought for a violation of the Constitution and claims authorized by and brought for a violation of a Federal statute. *See* 28 U.S.C. 2679(b)(2). In these claims, the individual is sued in their personal capacity. For instance, lawsuits against Federal employees in their personal capacities for alleged constitutional violations are available under certain circumstances since the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* decision was the first time that the Supreme Court recognized an implied cause of action directly under the Constitution for personal-capacity claims for alleged constitutional violations. In rare circumstances, even a State or common law claim might be brought against a Federal employee for whom the United States has formally substituted itself, but for which a court rejected substitution, and in these cases too, the individual could be liable in their personal capacity.

AmeriCorps believes that actions against its employees in their personal capacities and the potential for a judgment against agency employees may hinder the agency's effectiveness in meeting its mission. AmeriCorps employees' ability to carry out functions related to volunteer management and grant-making depends on the willingness of the employees to make decisions and take actions that may expose them to liability. Uncertainty regarding the potential for a personal liability claim resulting in monetary judgment may intimidate employees, stifle creativity and initiative, and limit decisive action. The threat of personal liability for a decision made or action taken as part of official duties can adversely affect AmeriCorps' achievement of its mission. The adoption of these regulations permitting indemnification would afford AmeriCorps employees the same protection given to Federal employees in several other government

agencies, including the Federal Trade Commission, Agency for International Development, Commodity Futures Trading Commission, Department of Commerce, Department of Education, Department of Health and Human Services, Department of the Interior, and the Department of Justice.

This final rule would address these situations when an AmeriCorps employee is sued in their personal capacity for conduct performed in the scope of their employment, by providing the process for AmeriCorps employees to request indemnification or settlement of a claim and the circumstances in which AmeriCorps may approve indemnification or settlement of a claim.

II. Development of this Rule

AmeriCorps proposed this rule on May 26, 2022. *See* 87 FR 31967. AmeriCorps received one comment during the public comment period. First, the commenter stated that the rule would create a lack of access to justice.

Response: The rule has no effect on any person's access to justice. Nothing in the rule would prevent or deter an individual from raising a claim against a current or former AmeriCorps employee or from obtaining a judgment against them.

The commenter also stated that a focus should be on preventing employees from overstepping their bounds rather than indemnifying them, and that the rule would embolden federal employees in committing injustices because they will be indemnified and undermine public trust.

Response: The rule does not provide employees with the ability or authority to act illegally or outside the scope of their employment. Federal employees face a number of consequences, including but not limited to termination and other legal action, that prevent them from "overstepping their bounds" and committing injustices. Neither does the rule guarantee indemnification of employees; rather, it establishes a process for employees and former employees to seek indemnification for claims against them

personally for conduct giving rise to the claims that was taken within the scope of their employment with AmeriCorps. The ultimate decision as to whether indemnification is appropriate is left to the AmeriCorps Chief Executive Officer.

Finally, the commenter states that the rule is extremely broad in that it would indemnify former employees and allow AmeriCorps to decide whether to indemnify in its sole discretion.

Inclusion of former AmeriCorps employees in the rule is necessary because a lawsuit may be brought against an individual related to actions conducted in the scope of their employment with AmeriCorps, even though AmeriCorps may no longer employ that individual. The final rule therefore continues to include former employees in its scope. The final rule also includes the provision stating that AmeriCorps will decide in its sole discretion whether to indemnify an individual. This provision is not overly broad because it includes criteria upon which AmeriCorps will base this decision (namely, that the AmeriCorps employee's conduct giving rise to the verdict, judgment, monetary award, or claim was taken within the scope of their employment; that the indemnification or settlement is in AmeriCorps' best interest; and that appropriated funds are available for the indemnification or settlement). *See* § 2502.40. It is appropriate for AmeriCorps' determination as to whether these criteria are met to be within AmeriCorps' sole discretion because determination of whether the indemnification is in the agency's best interest is subjective and therefore necessarily non-reviewable.

AmeriCorps did not make any edits to the proposed rule as a result of the comment.

III. Scope and Summary of the Final Rule

The rule would allow AmeriCorps to indemnify a present or former AmeriCorps employee who is personally named as a defendant in a legal proceeding for conduct arising within the scope of their employment when the FTCA does not apply because (1)

the claim alleges the conduct is a violation of the Constitution; or (2) the claim alleges a violation of a Federal statute that authorizes the claim; or (3) the claim is brought under State or common law against a Federal employee for whom the United States has formally substituted itself, but for which a court rejected substitution. The regulations would permit AmeriCorps to indemnify an Agency employee who suffers an adverse verdict, judgment, or other monetary award, provided that the actions giving rise to the judgment were taken within the scope of employment, and that AmeriCorps determines that the indemnification is in its interest. The regulations would also allow AmeriCorps to settle a claim brought against an employee in their individual capacity by the payment of funds, upon a similar determination. Generally, AmeriCorps will not entertain a request to indemnify a personal damage claim against an employee before entry of an adverse verdict, judgment, or monetary award. However, in certain cases, AmeriCorps may determine that exceptional circumstances justify the earlier indemnification or payment of a settlement amount. The rule would provide procedures for present or former AmeriCorps employees to follow if they are personally named in these types of lawsuits and wish to be indemnified, and also would provide procedures for AmeriCorps' review of requests for indemnification.

IV. Regulatory Analyses

A. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and

Regulatory Affairs in the Office of Management and Budget has determined that this is not a significant regulatory action.

B. Congressional Review Act (Small Business Regulatory Enforcement Fairness Act of 1996, Title II, Subtitle E)

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, AmeriCorps will submit for an interim or final rule a report to each chamber of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. The Office of Information and Regulatory Affairs in the Office of Management and Budget anticipates that this will not be a major rule under 5 U.S.C. 804 because this rule will not result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

C. Regulatory Flexibility Act

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), AmeriCorps certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, AmeriCorps has not performed the initial regulatory flexibility analysis that is required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) for rules that are expected to have such results.

D. Unfunded Mandates Reform Act of 1995

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538, as well as Executive Order 12875, this regulatory action does not contain any Federal mandate that may result in increased expenditures in either Federal, State, local,

or Tribal governments in the aggregate, or impose an annual burden exceeding \$100 million on the private sector.

E. Paperwork Reduction Act (PRA)

Under the PRA, an agency may not conduct or sponsor a collection of information unless the collections of information display valid control numbers. This rule does not contain information collection requirements within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

F. Executive Order 13132, Federalism

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has federalism implications if the rule imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rule does not have any federalism implications, as described above.

G. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable “taking.” A takings implication assessment is not required.

H. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

I. Consultation with Indian Tribes (E.O. 13175)

AmeriCorps recognizes the inherent sovereignty of Indian Tribes and their right

to self-governance. We have evaluated this rule under the AmeriCorps consultation policy and the criteria in E.O. 13175 and determined that this rule does not impose substantial direct effects on federally recognized Tribes.

List of Subjects in 45 CFR Part 2502

Administrative practice and procedure, Government employees, Indemnity payments.

For the reasons discussed in the preamble, under the authority of 42 U.S.C. 12651c(c), the Corporation for National and Community Service amends chapter XXV of title 45 of the Code of Federal Regulations by adding part 2502 to read as follows:

PART 2502—EMPLOYEE INDEMNIFICATION REGULATIONS

Sec.

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2502.100 How will AmeriCorps handle the request for indemnification?

Authority: 28 U.S.C. 2679(b)(1); 42 U.S.C. 12651c(c).

§ 2502.10 Purpose.

The purpose of this part is to provide the procedures for indemnification of AmeriCorps employees who are personally named in certain legal proceedings not covered by the Federal Tort Claims Act (FTCA) or the Federal Employee Liability Reform and Tort Compensation Act (FELRTCA) when AmeriCorps determines both that the actions arose within the scope of their AmeriCorps employment and that indemnification is in the agency's interest. These determinations are matters of agency discretion.

§ 2502.20 Applicability.

(a) This part is applicable to all former and current AmeriCorps employees, including special Government employees.

(b) This part does not apply to volunteers, service members, contractors, or any other individuals who may be affiliated with AmeriCorps, but not employed by the agency.

§ 2502.30 Definitions.

AmeriCorps means the Corporation for National and Community Service.

AmeriCorps employee means a current or former employee of the Corporation for National and Community Service, regardless of whether the individual was an employee before the Corporation for National and Community Service began operating under the name AmeriCorps.

CEO means the AmeriCorps Chief Executive Officer or their designee.

Covered claim means a claim seeking damages against an employee personally (or against their estate) for personal injury, death, or loss of property, resulting from the employee's activities, when AmeriCorps determines both that the actions arose within the scope of their office or employment but are not covered by the Federal Tort Claims Act (FTCA) or the Federal Employee Liability Reform and Tort Compensation Act

(FELRTCA).

General Counsel means the AmeriCorps General Counsel or their designee.

§ 2502.40 Under what circumstances may AmeriCorps indemnify employees?

AmeriCorps may, at its sole discretion, indemnify an AmeriCorps employee for a verdict, judgment, or other monetary award rendered against the employee personally in a claim or may settle or compromise a personal damages claim against an AmeriCorps employee if:

(a) The CEO determines that the AmeriCorps employee's conduct giving rise to the verdict, judgment, monetary award, or claim was taken within the scope of their employment;

(b) The CEO determines that the indemnification or settlement is in AmeriCorps' best interest; and

(c) AmeriCorps appropriated funds are available for the indemnification or settlement.

§ 2502.50 At what point in a legal proceeding will AmeriCorps consider a request to indemnify the employee?

(a) AmeriCorps may settle or compromise a claim against an AmeriCorps employee at any time.

(b) Unless there are exceptional circumstances, as determined by the CEO, AmeriCorps will not consider a request to indemnify a claim before entry of an adverse verdict, judgment, or award.

§ 2502.60 What types of legal proceedings may an AmeriCorps employee seek indemnification or settlement for?

An AmeriCorps employee may seek indemnification or settlement in any civil action or proceeding brought, in any court, for a covered claim.

§ 2502.70 What must an AmeriCorps employee do if served with process or pleadings that includes a covered claim?

An AmeriCorps employee who is named as a defendant (or the personal representative of the AmeriCorps employee's estate) in a legal proceeding that includes a covered claim and who wishes to seek indemnification must promptly notify their supervisor, who then promptly notifies the Office of General Counsel. Former employees must directly notify the Office of General Counsel.

§ 2502.80 What may the General Counsel do upon receipt of the process and pleadings and report of circumstances?

Where appropriate, the General Counsel may request that the Department of Justice provide legal representation for the AmeriCorps employee.

§ 2502.90 How may an AmeriCorps employee request indemnification?

To request indemnification for a verdict, judgment, award, or settlement proposal of a covered claim, the AmeriCorps employee must:

- (a) Have complied with the requirements of § 2502.70.
- (b) Submit a written request, via their supervisor, to the head of the employee's office, or (in the case a former employee) directly to the Office of General Counsel. The written request must include appropriate documentation, including copies of the verdict, judgment, award, or settlement proposal.

§ 2502.100 How will AmeriCorps handle the request for indemnification?

(a) The head of the office or their designee will review the employee's request and submit all of the following to the General Counsel:

- (1) The original or a copy of the employee's request.
- (2) A recommendation to approve or deny the request.
- (3) A detailed analysis of the basis for a recommendation.

(4) A certification from the Chief Financial Officer as to whether the agency has funds available to pay the indemnification.

(b) The General Counsel will:

(1) Review the circumstances of the incident that gave rise to the action or proceeding, and all data relevant to the question of whether the employee was acting within the scope of their employment.

(2) Where appropriate, seek the views of the U.S. Department of Justice and/or the U.S. Attorney for the district encompassing the location where the action or proceeding is brought.

(3) Prepare a recommendation to approve or deny the request.

(4) Forward the request, the accompanying documentation, and the General Counsel's recommendation to the CEO for a decision.

Dated: August 22, 2022.

Fernando Laguarda,

General Counsel.

[FR Doc. 2022-19322 Filed: 9/6/2022 8:45 am; Publication Date: 9/7/2022]